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IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

No. 380.

CANADIAN RIVER GAS COMPANY, A CORPORATION, *Petitioner*

v.

FEDERAL POWER COMMISSION, CITY AND COUNTY OF DENVER,  
COLORADO, PUBLIC SERVICE COMMISSION OF WYOMING,  
COLORADO-WYOMING GAS COMPANY, PUBLIC SERVICE  
COMPANY OF COLORADO, AND COLORADO INTERSTATE GAS  
COMPANY, *Respondents*.

**PETITION OF THE INDEPENDENT NATURAL GAS  
ASSOCIATION OF AMERICA, AMICUS CURIAE,  
FOR A REHEARING.**

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April 26, 1945.

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The decision of April 2, 1945, in this proceeding has served only to render more perplexing an already confused and somewhat bewildering situation. Four only of the nine Justices of this Court would unqualifiedly sustain the Federal Power Commission in its assumption in this case of rate-making authority over the "production and gathering" of natural gas; four of the remaining five Justices would

reverse that action as clearly beyond the Commission's statutory jurisdiction, while one—the Justice whose conclusion thus became controlling—has declared, in effect, “I would like to reverse the Commission's action, *but* . . .”

It is to this formidable and here decisive little “*but*” that we must therefore address ourselves. What is the nature and fundament of this curious judicial paradox? What has actuated this singular resolution of the essential issue of this cause?

The Independent Natural Gas Association of America did not seek to appear as *Amicus Curiae* in this proceeding because of any special or financial interest in this particular cause or in this particular Petitioner. It appeared because of its members' conviction that a sound resolution of the issue of Federal Power Commission authority over “production and gathering” under the Natural Gas Act is a matter of paramount import to the entire natural gas industry, and particularly to the multitude of independent producers and royalty owners of the country who form the backbone of this widespread industry. The value of their wells and gas reserves is directly affected by the ruling which has here been made. Indeed, their interests, wherever they may be, are as directly affected by this decision as are those of this pipeline company. If it be the law that the value of half the gas produced from a given gas well is to be determined by costs incurred many years ago (or perchance by no cost at all) under exploratory conditions wholly at variance with those now prevailing, it is obvious that the value of the other half is at once affected, as is also the value of the royalty owner's interest. A general adoption of the cost method of valuing gas-producing properties—as here exemplified—cannot fail, therefore, to affect the value of all reserve and gas well properties. This effect is as immediate as it is certain. That is why we are here, and it is the only reason we are here. That, also,—as we believe—was the real reason why Congress at least at-

tempted to withhold the sphere of "production and gathering" from the Commission's jurisdiction.

Under these circumstances, this Petition for Rehearing is necessarily aimed with the utmost frankness at Mr. Justice Jackson's opinion and reasoning. If the situation which the learned Justice deemed controlling, contrary to his expressed desire to reverse the Commission in this case, should in some appropriate manner be disclosed not to be thus logically or properly determinative in this particular proceeding and against this particular company, then, we believe, a majority of the Justices of this Court would at least be in agreement in favor of an "end result" of reversal by this Tribunal, whether or no they might wholly agree upon the appropriate legal basis for such action. We file this Petition, therefore, not for any purpose of delay, but because we are convinced, in all good faith, that we can fairly show that Mr. Justice Jackson's concurring opinion resulted from a misapprehension of certain factors basic to this case.

We shall here advert to but two of these factors. Both are involved in Mr. Justice Jackson's reasoning under the *Hope* decision.<sup>1</sup> As we read his concurring opinion, the basic concept underlying his reasoning in his belief that, for judicial purposes, it is essential that the philosophy expressed in the *Hope* case shall prevail until—as we understand him—the supporters of that philosophy finally hang themselves upon the horns of an as-yet-unforeseen but inevitable dilemma. Frankly, we can read no other premise into the learned Justice's observation that he possesses "no intuitive knowledge as to whether a given price is reasonable"; his assertion that he cannot with sincerity recede from his reasoned expression in the *Hope* case, and his firm belief that the Court's decision in that proceeding provides "no workable basis for judicial review, no key by which

<sup>1</sup> Federal Power Commission v. Hope Natural Gas Co., 320 U. S. 591.

commissions can anticipate what rule, if any, will control our review, and no guidance to counsel as to what issues they should try or how they should try them," and—finally—his statement that "the majority which promulgated that decision, or a majority of that majority, should be permitted to continue to spell out its application to specific problems until we can see where it leads."

If, as Mr. Justice Jackson also asserts, the philosophy underlying the *Hope* case is, in fact, "fantastic," then assuredly there lurks behind his reasoning the conviction that further application of that philosophy to specific problems cannot fail to lead to fantastic results. It is the belief of your *Amicus Curiae* that such a consequence has already come to pass in this very proceeding, and that the learned Justice may, on the best of rational grounds, adopt that view in the light of:

- (1) His misapprehension in respect of the rates actually here involved, and
- (2) His (as we believe) misconception of the "immediacy" of impact of the Commission's action upon "production and gathering" activities.

# I

## THE RATES HERE INVOLVED PRESENT NO DISPARITIES OF THE NATURE OUTLINED IN THE CONCURRING OPINION.

Mr. Justice Jackson is deeply and sincerely concerned with the proper conservation and use of natural gas as a national resource. He has noted an apparent disparity in the prices charged by the Colorado Interstate Gas Company, appellant in another and separate proceeding, for gas sold by that company to the Colorado Fuel and Iron Company for industrial purposes, on the one hand, and for gas sold by Colorado Interstate to the distributing company serving the city of Denver, on the other. We are advised that the prices mentioned by the learned Justice in respect

of such rates are not in fact correctly stated, and we are further advised that the actual disparity is much less than he has suggested. Be that as it may, the fact is that by the use of such criteria Mr. Justice Jackson has fallen into what we respectfully believe to be the error of resting his conclusion under this phase of his reasoning upon rates applicable wholly to a totally different entity from that which is the subject of this proceeding, the Canadian River Gas Company.

Colorado Interstate is not Canadian; it is a customer of Canadian, and has so been held by the Federal Power Commission, which has fixed the rates of Canadian for all sales of gas to Colorado Interstate, without distinction as to eventual use or eventual purchaser, and which has been held justified in so doing by this Court. There is not now, nor has there ever been, any disparity between the price charged by Canadian to Colorado Interstate for gas to be sold by the latter for various purposes or to various customers or types of customers. The disparity of rates which has impressed Mr. Justice Jackson (even were it of the magnitude which he supposed) has therefore no application to Canadian, whose rates were separately fixed by the Commission upon the basis of facts not pertinent to Colorado Interstate. Certainly, it should not require argument to convince the learned Justice that, in such a situation, he has fallen into a not unnatural but nonetheless determinative factual pitfall. It is like condemning a farmer because a portion of the pork products sold by him at a uniform price to a butcher were found to have been resold by the latter in the black market.

The fact is that Mr. Justice Jackson has rested his view that the "end result" of the rate order fixing Canadian's rates may be supported under the *Hope* case philosophy upon certain assumed facts which simply do not apply to the company whose rates are here at issue. Those other rates were at issue in a totally separate and distinct pro-

ceeding. They were necessarily the subject of a separate order of the administrative tribunal. The appeal of that other company from that order constitutes a totally different and necessarily distinct appellate proceeding before this Court, which was briefed and argued separately and was only joined for decision with the case of Canadian River Gas Company for purposes of convenience. These separate appeals raised wholly separate and distinct issues for determination by this Court. That other company has no production or gathering properties, and its rates simply are not at issue in this proceeding. Yet, on the basis of that other company's charges to various consumers for regulated and unregulated gas, respectively, and not otherwise—as we understand him,—has Mr. Justice Jackson rested his determinative opinion that the *Hope* case philosophy may here be applied.

We believe that a rehearing of this case will show this to be trite. And if it be true, may not an alteration in the learned Justice's decisive opinion reasonably and fairly be expected?

## II.

### THE IMMEDIACY OF IMPACT OF THE COMMISSION'S ACTION IN RESPECT TO PRODUCTION AND GATHERING.

The confusion of Colorado Interstate, and its rates, with Canadian, and its rates, is the more unfortunate—in the light of the curious 4-4-1 decision which has here eventuated—because it has apparently led to another quite disconcerting conclusion on the part of the concurring Justice, a conclusion which seems wholly at variance with the reality of what the Commission here did. Indeed, the very nub of this entire proceeding, as it turns out, is the declaration by Mr. Justice Jackson to the effect that the order here under consideration has no “immediate” impact upon the production or gathering of gas by the Petitioner. The implication is plain that, had the learned Justice been of

the opinion that the order did have such "immediate" impact upon production and gathering, his resolution of the issue of jurisdiction would have been different. Let us therefore briefly examine the nature and essence of that impact.

In the first place, if a man owns a house and some official tells him he may not paint it, the impact as to paint may be immediate, but he still owns the house and may sell it, if he so desires, at whatever price he can obtain. On the other hand, if, after receiving an offer of \$10,000 dollars for the property, the same houseowner were to be told by some authority that he could only receive \$5,000 dollars from the sale, the impact might not be "immediate," in a certain sense, but its result would doubtless be far more drastic. And if the poor fellow needed to obtain cash for any reason—perhaps to paint another house—we more than suspect that the impact of the latter ruling would be much more actual—and indeed more truly "immediate"—than would that of the former.

This is the very situation here confronted. Natural gas reserves are not bought or sold or held merely for fun. They have no value save as they may be used, through present production and sale of gas from wells drilled into them, or by reason of potential sales which will return more than the cost of holding the gas for a time in the ground. The operations of production and gathering of gas are for one purpose, and one purpose only,—to market the gas so produced. If it could not so be marketed there would be no such operations. And if the price at which it can be marketed by one producer is held to an amount less than another producer may freely charge, the production operations of the first producer are as "immediately" affected as if some of his wells were destroyed. Only for the purpose of proper conservation, and then only on an impartial basis applicable to all, would any such result be consistent with justice and reason. And in such a case the methods

used would necessarily differ in kind from those adopted here.

The Commission did not here act for conservation reasons. It did not even purport to do so, and it is doubtful whether it could have acted for such reasons in any event, since this function has been reserved to the states. But the result is that this producer, this petitioning corporation, is so immediately affected that its production and gathering operations are not merely hampered or rendered less profitable,—they are jeopardized in their entirety. And the interests of the gas consumers for whose benefit this company's gas reserves have been collected are likewise vitally and immediately affected.

In this connection, it is fundamental to remember that one of the most essential functions of a large natural gas pipeline project consists in the "blocking out," by contract, purchase or otherwise, of sufficient reserves of gas in the ground to assure the successful maintenance of the enterprise over a considerable period of years. The consuming public at the discharge end of a long transmission pipeline would hardly be protected or satisfied if the enterprise possessed only the mere hope of being able, from year to year, on some annual catch-as-catch-can basis, to continue to secure its necessary supplies of gas in the field. It is therefore sound economics for such a system to provide itself with adequate reserves of gas, not merely to make certain that the cost of its project may be returned out of earnings over the years (a *sine qua non* for the attraction of investors, and thus for the sound financing of the project), but also to insure to its patrons an adequate and continuing supply of gas. The importance of this element of natural gas pipelining operations cannot be too greatly emphasized.

The effect of the decision in the instant case, however, cannot prove other than a deterrent to any such procedure. Already it is being said in the industry that it would be far better for producers to sell their gas in the field for unre-

gulated uses only (thereby jeopardizing the future reserves of all natural gas pipelines) than to risk being forever held to "aboriginal cost" as the basis for the pricing of gas entering an interstate pipeline.

It is, of course, the interplay of economic forces, rather than the operation of any regulatory processes—as such, which draws gas from the earth into the stream of commerce. A regulatory process wholly at variance with the economics of the problem may, however, produce seriously deleterious effects. As Mr. Justice Jackson has remarked, a price of gas in the field sufficient to draw it into the stream of commerce, but no greater price, is what is economically required. And, as the learned Justice has likewise pointed out, the "aboriginal cost" method of pricing such gas produces a result bearing no relation, logical or otherwise, to such an economic price. The forces which underly this situation rest in delicate balance, and obviously, should any large proportion of the owners of gas reserves (or of gas produced in association with oil) find it uneconomic—as they doubtless will—to allow their gas to enter interstate pipelines for regulated uses on the aboriginal cost pricing basis, the gas in question will inevitably be diverted to other ends. Here, again, is seen the true "immediacy" of impact of this decision upon the production and gathering of natural gas.

The force of this impact, and the vital relation between price and conservation, are well illustrated in certain recent statements and reports, from which we deem it appropriate to quote. For example, Commissioner Ernest O. Thompson, of the Texas Railroad Commission, aptly described the situation when he recently remarked (see *The Oil Weekly*, March 12, 1945, p. 27):

"We have an abundant supply of gas in Texas. We are marketers of gas. . . . It is my view that as we have more competition in the purchase and sales of gas we shall get a better price for it. . . . When we get a better price we can have better waste prevention; as the

owners will have something worth conserving and they will not allow it to be blown into the air."

In similar vein, Commissioner Beauford H. Jester, of the same Commission, is quoted in *The Oil Weekly*, for December 11, 1944, as declaring that "too much gas has been wasted in the past because it had no market and consequently no sale value."

In the leading editorial in the January 1945 issue of *Gas*, Mr. Elliott Taylor spoke of the work being done by the Regulatory Practices Committee of the Interstate Oil Compact Commission (which represents states producing some 80 per cent of the total of natural gas now being marketed). Of that Commission, Mr. Taylor says:

"Perhaps better than any single regulatory body the Commission recognizes the delicate balance that exists between the economics of natural gas disposition and that of petroleum production. It recognizes the fact, sometimes obscured to the Federal Power Commission, that pure social theories cannot be relied upon to bring oil to the surface and leave the gas behind. And it recognizes that what happens to the natural gas that comes to the surface in association with petroleum production depends almost entirely on what that gas is worth. If it commands no better price than 15c to 20c at the wellhead it is not worth conserving and no legislative interference with the ultimate disposition of the gas will ever change that simple economic fact. The studies of the oil compact commission's special committee have convinced its members that better prices seem obtainable only through an expanding competitive market."

We cannot fairly leave this subject of the influence of price on sound conservation practices without quoting briefly from the report of the committee of which Mr. Taylor was speaking. In December 1944 that committee stated (*Quarterly Bulletin*, Vol. I, No. 4):

"There has been considerable discussion concerning the importance of the price paid for gas as affecting its

conservation. It is a matter of common knowledge that low prices and that existing disparity of prices have created great confusion in the natural gas industry.

"Your Committee on Regulatory Practices is of the opinion that these elements have rendered extremely difficult the duty of the enforcement of conservation statutes; and that any successful program of conservation and utilization must, in the last analysis, frankly face this issue and take it into consideration."

In an earlier report (published in the *Quarterly Bulletin* of the Oil Compact Commission, Vol. III, No. 2, July 1944), this same committee remarked that, as early as December 1942, it had pointed out "the relationship which the price of natural gas had to the problem of conservation," and it added that many projects for the expanding uses of natural gas, chemical and otherwise, in the interests of its sound utilization, "could not, and would not, be constructed if the product at the wellhead was not commanding a price commensurate with its intrinsic worth."

We have adverted to these reports and statements solely because of their important, and wholly independent, bearing on the issue here under consideration. If the fair market price of gas at the wellhead is not to be allowed to govern, but if—instead—some lower, "aboriginal cost" method of pricing such gas is to be adopted (with widely varying price levels as between different producers in the same field, and, indeed, between producers from the same well), the impact of that method (which is wholly oblivious to existing economic balances) cannot fail to be both "immediate" and certain in every gas-producing area. It is an immediate and certain upon the industry as a whole as it is with reference to this single gas producer's operations.

One further word on the "immediacy" of impact upon this single company. Even were we to accept the premise that the statutory exception of "production and gathering" applies only to the "activity" of producing and gathering gas, the impact of this order is direct and immediate upon

that activity. For example, the Commission has essayed to fix the amount of working capital which this company may be allowed for the conduct of its production and gathering operations. It has authorized no earnings at all for gas produced from some wells, and only a bare pittance for gas from others. It has purported to establish the precise amounts which will be allowed the company to cover the cost of future producing and gathering operations. It has altered the amounts already fixed by contract for the carrying on by this company of producing and gathering "activities." And the company is obviously placed in a position in which, because of this treatment of its production and gathering "activities" (which constitute some two thirds of its business), it cannot meet its actual costs incurred in those activities. If to force a corporation into probable bankruptcy, under such circumstances, or if to fix and limit by administrative mandate the precise amounts which this enterprise will be allowed to recoup as operating expenses for and in respect of such production and gathering activities, is not to exert "immediate impact" upon the activities which constitute so great a proportion of its business, then we are at a loss to understand the English language.

So far as the "impact" upon an owner of a gas lease is concerned, the result of an order that he may not charge anything for gas from a well he has already drilled is just as "immediate" as it would be if the order were that he would not be allowed to drill a well at all. His production "activities" are equally affected and circumscribed. And the "impact" of an order allowing him to charge rates covering only the operating expenses of one well halts him as "immediately" from drilling another as would a direct order not to drill the second well. To say that the "activity" of gas production is not as immediately affected by the one order as it is by the other seems only to beg the question posed here by the Congressional prohibition

against the application of this statute to production and gathering.

It affords us small consolation to recall that the Chief Justice, and his associates in this case, clearly recognized the immediacy of such impact, and also recognized the fact that, by reason of the treatment accorded these production and gathering properties by the Commission, the most direct possible form of regulation has been imposed upon such properties, despite the language of Section 1(b) of the statute. We say that this affords us small consolation because we are confronted with an assertion by the Justice who concurred in result only with another four Justices merely declaring—without more—that the impact is somehow not “immediate.” We believe we have illustrated how truly immediate the impact is, and should this petition for rehearing be granted, we feel certain that we can disclose to the concurring Justice that his assertion in this regard resulted from a misapprehension of certain of the basic factors here involved.

### III.

#### THE HOPE DECISION AND THE INSTANT CAUSE

We are constrained to add a few words anent the *Hope* decision and its applicability to the situation here confronted. We have read and reread that decision, and, though the matter is not there made entirely clear, we fail to find in that case any suggestion that an administrative body is henceforth to be relieved of the duty to consider and act in such a matter on *some* reasonable basis. All that we discern for certain is that the administrative process is not held to any particular set course. But the course adopted must, we believe, bear some logical relation to the end which is being sought. The majority in the *Hope* case found that relation in certain record data on corporate financial background and the maintenance of financial integrity. At no point do we find support for the thought

that ratemaking is by that decision afforded the freedom of mere intuitive processes.

Certainly, neither Mr. Justice Jackson, nor\* (we believe) the Justices for whom Mr. Justice Douglas spoke in the instant case, would find support in the *Hope* case philosophy to sustain a rate ruling of an administrative body whose end result (i. e., the rates finally established) rested solely and wholly upon a mere count of the baldheaded men in the hearing room, without more in the record. Nor would they, or any of them, apparently sustain such an order were it based wholly upon a record and finding that on the day of hearing it was raining. Such extraneous criteria could hardly support any reasonable conclusion on the technical subject of rates, and as we read the *Hope* decision there must be some logical criterion of judgment on which the "result" of the rate-making process may be measured, even though the "mechanics" has not been frozen to any particular course.

As we understand them, Mr. Justice Douglas and his associates looked in the *Hope* case for such a criterion in the financial and credit maintenance necessities of the corporation there involved. Had it been clear in that case that, though soundly financed and efficiently managed, and though possessed of a well-balanced capital structure and a sound market, that corporation could not maintain a reasonable position of financial integrity upon the rates as fixed, the decision—as we discern its reasoning—would have been different. In other words, for the "fair value times fair rate of return" criterion, these Justices there substituted a highly positive standard, which, as to rates otherwise reasonable under value of service criteria, they felt could fairly be used as a guide.<sup>2</sup> The matter was therefore

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<sup>2</sup> See "The *Hope* Case and the Direct Approach to 'Fair Return,'" by Carl I. Wheat, *Public Utilities Fortnightly*, April 27 and May 11, 1944 (Vol. XXXIII, Nos. 9 and 10, pp. 531 and 617). Also, "the Direct Approach to the Fair Return Ques-

not merely one of "intuition," nor could the decision to support the Commission in that case be truly termed a mere drawing of a paper out of a hat.

In the instant proceeding, however, we seek in vain for data on which to apply any such yardstick as was thus established in the *Hope* case for the reasonable measurement of the "end result" reached through the administrative process. *The only data suggested by Mr. Justice Jackson applies solely to another company in a different proceeding and has no applicability of any sort to this company or to this case.* In the absence of such data, the only support for the sole criterion even hinted at in the *Hope* case is here lacking, and even a Justice who supported that ruling (not to mention one who dissented) could, as we see it, fairly, soundly and logically rule here to reverse the administrative action. Otherwise, we would be left merely with a process of counting bald heads, and surely that cannot be the sort of means which could justify an end in rate-making, even under the broadest interpretation of the *Hope* case. Even under that decision, the end must be justifiable under facts applicable to the concern whose rates are at issue. And even under that decision, the "end result" must find support in reason, regardless of the frailties of any particular method that may have been used to reach it.

We therefore respectfully suggest that Mr. Justice Jackson concluded to allow the *Hope* case philosophy to prevail in this cause as a result of a misunderstanding of the admittedly complex record in this proceedings. We further respectfully suggest that, as a direct and immediate result of that misconception (and the erroneous consideration of

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tion," by Paul B. Coffman, *Public Utilities Fortnightly*, August 27 and Sept. 10, 1942 (Vol. XXX, Nos. 5 and 6, pp. 277 and 350), and "The Problem of the 'Rate of Return' in Public Utility Regulation," June 15, 1938, a report of the Telephone Rate and Research Department (Telephone Investigation) of the Federal Communications Commission.

another company's rates and operations as applying to this company's situation), the learned Justice has rested his concurring opinion upon a semblance of actuality which simply does not in fact exist in this case. A rehearing and reconsideration of this matter will, we verily believe, disclose this to be the situation.

### CONCLUSION.

One final aspect of this situation should be noted. We have already adverted to the sincere interest of Mr. Justice Jackson in the sound conservation of natural gas resources. With this conviction we find ourselves in hearty agreement. We have also adverted to the fact that the price at which gas produced in any given field may be sold is a vital factor—indeed, the critical factor—in inducing the sound conservation of such a resource. That this factor looms especially large in the case of natural gas is amply demonstrated by the history of this very gas field, the so-called Panhandle Field of Texas. It was during the early years following the discovery of that field, but before the advent of the pipelines which now carry much of its gas to distant markets, that waste of the grossest type existed. The prime reason for such waste was the utter lack of any economic market. Only when a market was developed through the construction of pipelines, and only when the value of the gas in the field was thus raised to more economic levels, was this waste curtailed.<sup>3</sup>

May we respectfully yet earnestly suggest that the decision in the instant cause cannot fail to produce effects

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<sup>3</sup> Description of the chaotic conditions and waste of gas which prevailed during the earlier years of the Panhandle Field, prior to the advent of large pipelines and the consequent provision of a distant market for gas, which would otherwise have been wasted, are to be found in *Thompson v. Consolidated Gas Utilities Corp.*, 300 U. S. 55, 81 L. Ed. 510, and *Final Report of the Federal Trade Commission* on economic conclusions respecting natural gas (Senate Document 92, Part 84-A, 70th Congress, 1st Session).

upon conservation in this and other gas fields of the most harmful character, through limitation of values—and therefore of the price incentives which produce truly economic conservation practices. If it be allowed to stand, the ruling of the Federal Power Commission in respect to this Petitioner cannot fail, in our opinion, to encourage inefficient uses of gas in or near gas fields; to inhibit many types of uses as to which natural gas is the technically preferred fuel, and generally to restrict development and ultimate production in the Panhandle Gas Field, with resultant social and economic loss to the nation as a whole.

WHEREFORE, The Independent Natural Gas Association of America respectfully requests that a rehearing be granted in this matter, that reconsideration of these pertinent issues be undertaken, and that the mandate of the Court be stayed until such time as the proceeding may have been concluded.

Respectfully submitted,

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April 26, 1945.

### **CERTIFICATE.**

Carl I. Wheat, of counsel for The Natural Gas Association of America, appearing herein as *Amicus Curiae*, hereby certifies that the Petition for Rehearing filed herewith is presented in good faith and not for delay.

CARL I. WHEAT.

Washington, D. C.

April 26, 1945.